Treachery and Its Consequences:

Civilian Casualties During Operation Iraqi Freedom and the Continued Utility of the Law of Land Warfare

by Major Dennis P. Chapman

Among the themes pervading our recent invasion and occupation of Iraq, two merit particular attention: civilian casualties and Iraqi violations of the law of war. While both phenomena are ubiquitous in the annals of warfare, their occurrence during Operation Iraqi Freedom illuminates a crucial fact — collateral injury to civilians and violations of the law of war do not merely occur in parallel. However, they are often causally linked. Many tragedies in Iraq amply demonstrate that where one or more parties to a conflict regularly disregard customary moral and legal constraints on the conduct of operations, increased civilian casualties inevitably result.

On 31 March 2003, a van sped through a U.S. military checkpoint near Najaf, Iraq. After the driver ignored warnings to stop, the troops opened fire, bringing the vehicle to a halt. Inside, soldiers found seven women and children killed — all unarmed.[1] Within hours, U.S. Marines south of Baghdad gunned down an Iraqi driver at a checkpoint and, like the women and children above, he proved unarmed.[2] Tragically, these are only two of a number of such killings by coalition forces in Iraq during Operation Iraqi Freedom.

How did these tragedies occur? Why did American servicemen — overwhelmingly decent, moral, well-trained, and well-disciplined young men and women — find themselves mistakenly killing the very innocents they were sent, in part, to save? They did so because they were provoked: not by the innocent victims themselves, but by agents of the dying Iraqi regime.[3] The soldiers and Marines who fired these shots did so because they were afraid of becoming the latest victims of Baath Party treachery.[4]

Early in the invasion, American troops fell victim to suicide attacks by fighters posing as civilians, sometimes feigning distress. On 29 March 2003, a man posing as a taxi driver approached a checkpoint and gestured for the soldiers manning it to approach his vehicle, as if requesting assistance. When soldiers did approach, he detonated a car bomb.[5] Two weeks later a vehicle stopped near a checkpoint and discharged a hysterical, pregnant woman. As our troops approached to offer assistance the driver detonated another car bomb.[6]

These attacks, where Iraqi fighters exploit the protected status of noncombatants as cover for attacks on coalition troops, create a climate of apprehension and mistrust among our soldiers, who find themselves not knowing whether the people coming and going around them are civilian noncombatants or a covert and deadly threat.[7] While civilian casualties always occur in war, the ambiguous and uncertain environment spawned by this enemy misconduct almost certainly exac-

erbates the situation, greatly increasing the risk of harm to innocent civilians and causing many needless casualties among them.

In deliberately disguising themselves as civilian noncombatants, Iraqi fighters violate one of the most widely accepted norms for the conduct of warfare. The hideous and all too foreseeable consequences of these acts point the way to a renewed understanding of the rationale — the moral basis — for the constraints on combat action that we know collectively as the law of war.

"War is cruelty, and you cannot refine it."[8] So wrote William Tecumseh Sherman, an early practitioner of total war. Is he right? He certainly has a point. By the mere act of maintaining an armed force, society implicitly accepts that, under certain circumstances, the ordinary rules by which we live our lives may not apply: rules against killing, against destruction of property, and against compelling citizens to act against their will (by serving in the armed forces). When a government makes the decision to go to war, it has concluded that the controversy at issue or the values at stake are so profoundly important or so dangerously threatened that such extreme measures are justified.

Having accepted the infliction of such damage as sometimes necessary and appropriate, why do we muddy the waters by attempting to shield certain persons from the ill effects of war, while deeming others legitimate targets and thus fair game to be killed? Having once deemed it necessary and proper to seek and exploit almost any advantage in our quest to weaken and destroy our enemy, why do we cloud the issue by singling out certain practices and stratagems as perfidious and hence prohibited?

We do so because we disagree with General Sherman. While war certainly is hell, we reject the temptation to conclude that because it is hell we are released from all moral restraint during armed conflict. Although we accept the premise — reluctantly — that violence is sometimes a necessary and appropriate means of settling international controversies, it remains a *disfavored* means: a method of last resort to be used only under exceptional circumstances and, most importantly, the scope and impact of which is to be strictly limited to the objects in question. To the extent possible, the damage inflicted should relate to the objective and end state sought; it should never be inflicted arbitrarily or vindictively. Toward this end, society at large has erected a structure of rules, norms, and agreements that aim to limit the social costs of war. We know these rules collectively as "international law" or the "law of armed conflict."

International law differs significantly from the national law of individual countries. Whereas the domestic law of states is generally founded on compulsion — that this, the power of the state to compel compliance — international law is built on the twin bases of *consent* and *consensus*. The basic laws governing the behavior of states are simply those customs and practices that most countries acknowledge as appropriate. This is known as customary law, the "consensus" component of international law. Like the common law with which we are familiar in English-speaking countries, customary international law develops and changes over time as social and political norms evolve.

The second basis of international law consists of the treaties and agreements by which states voluntarily undertake to regulate their own conduct.[9] This is the "consent" component of international law. U.S. Army Field Manual 27-10, *The Law of Land Warfare*, sets forth a list of such treaties that pertain to armed conflict. The most prominent of these are the Geneva Conventions of 1949 and the Hague Conventions of 1907.[10]

The twin pillars of consent and consensus exist in a state of tension. The idea that no state can be bound except by its own consent is the foundational concept

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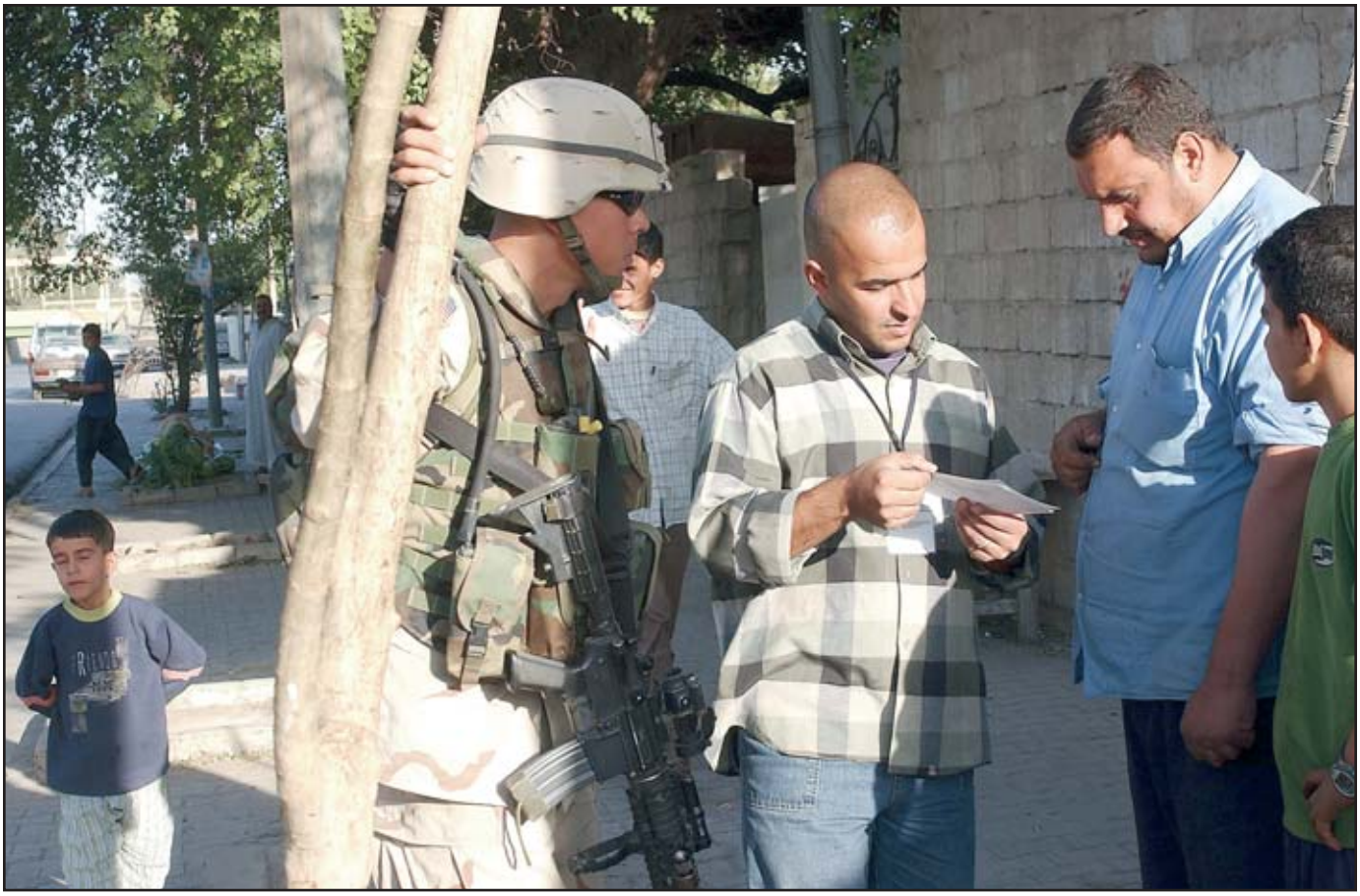

"During the course of Operation Iraqi Freedom, fighters loyal to Saddam Hussein violated all of these. The most common such violation — and the one attended by the most tragic results — attacking U.S. forces while under civilian disguise. Protecting civilians from the evil effects of battle has long been a fundamental goal of the law of armed conflict. To that end, international law has long sought to "maintain the distinction between combatants and noncombatants with as much clarity as possible."

of international law, one vigorously maintained by many countries. Despite this, the international community expects every state to adhere to the basic standards of customary law, whether or not a given country acknowledges such an obligation. The importance of consent in the international system has led some to argue that international "law" as such does not exist at all. At the opposite extreme are those who argue that the evolving web of multinational organizations, treaties, conventions, and institutions currently in place has displaced the principle of consent, and that the wide recognition and legitimacy of these international structures invest them with quasi-legislative authority. In my view, the truth lies in the middle: the principle of consent not only endures, but remains the cornerstone of the international system. That said, it is perfectly clear that states are not absolutely free to act in any manner they deem fit, save for restraints that they voluntarily assume. While states may not be compelled to take specific, detailed actions without their own consent, they must still adhere to the broader standards of conduct embodied in customary international law, whether they consent to be bound or not.

A final, critical note on the concepts of consent and consensus — while treaties generally do not bind states not signatories to them, *they may constitute evidence of what the customary international law is*. Furthermore, some treaties or their provisions may achieve such widespread acceptance and legitimacy that they may come to be accepted as declaratory of customary international law — that is, *they may be incorporated into the customary law of nations and become binding on all states as a result*.[11]

The law of war seeks to limit or restrain the social costs of war in three ways: by protecting "both combatants and noncombatants from unnecessary suffering;" by "safeguard[ing] certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians;" and by "facilitat[ing] the restoration of peace."[12] In pursuit of these aims, international law imposes certain standards on all combatants in armed conflicts. These include requirements to wear uniforms or distinctive insignia and to bear arms openly; prohibitions against abuse of flags of truce or equivalent symbols, and against the misuse of symbols such as the red cross or red crescent; and rules concerning the status of cultural and humanitarian sites during wartime.[13]

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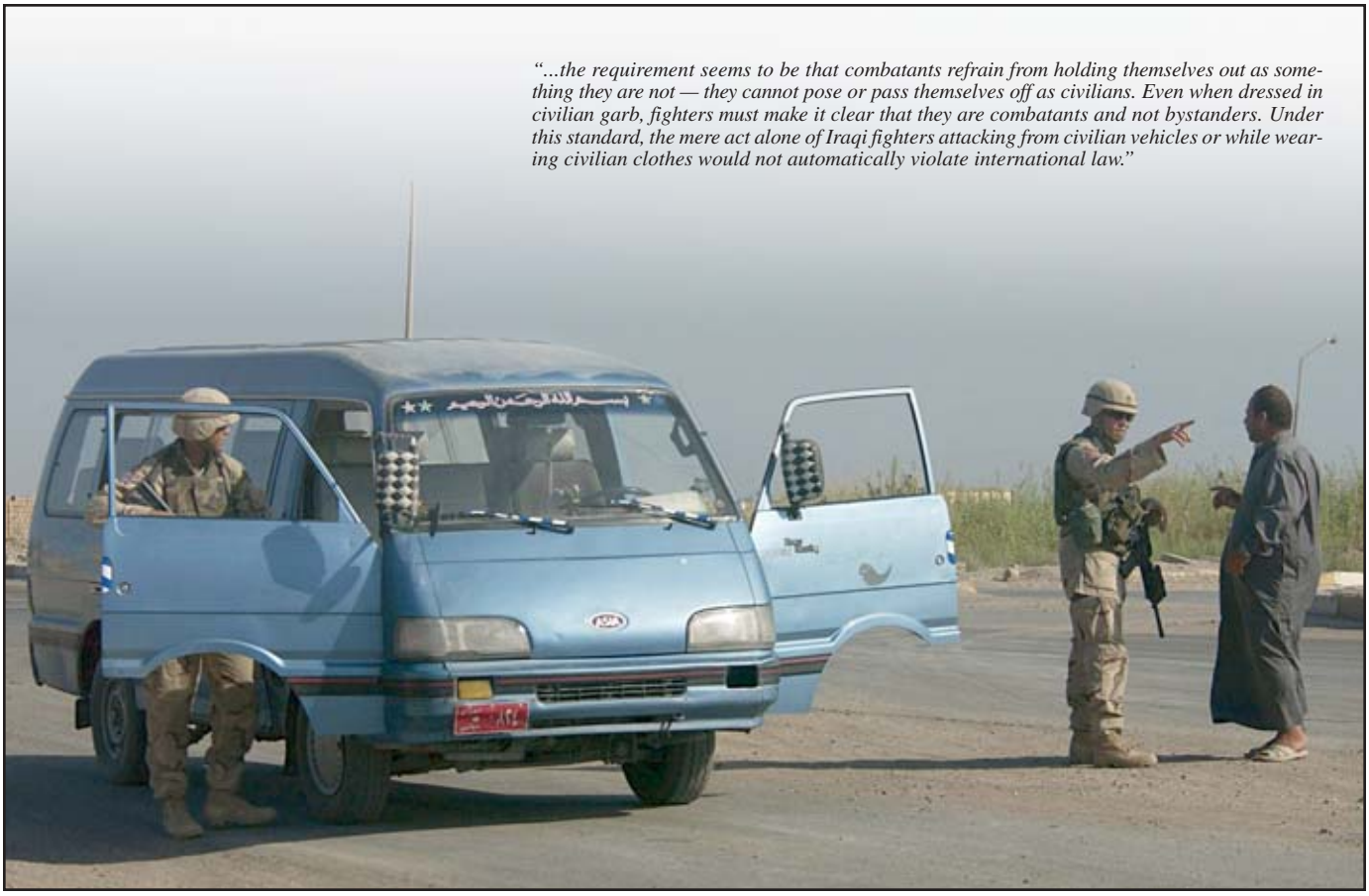
Prior to 1977, this was accomplished by focusing heavily on wearing uniforms and distinctive insignia. The Hague Convention (IV) of 1907 sought to incentiv-



"...the requirement seems to be that combatants refrain from holding themselves out as something they are not — they cannot pose or pass themselves off as civilians. Even when dressed in civilian garb, fighters must make it clear that they are combatants and not bystanders. Under this standard, the mere act alone of Iraqi fighters attacking from civilian vehicles or while wearing civilian clothes would not automatically violate international law."

ize compliance with this norm by establishing the following qualifications for the status of belligerent, and hence for the protections afforded to legitimate combatants under international law: "the laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. Have a fixed distinctive emblem recognizable at a distance;
3. To carry their arms openly;
4. To conduct their operations in accordance with the laws and customs of war."[15]

The rationale for such qualifications is clear: "The concealed combatant certainly has an advantage over the uniformed soldier, but it is a price that others must pay. It inevitably leads to increased casualties among the civilian population, as the uniformed adversary can no longer clearly distinguish between combatant and noncombatant."[16]

The Hague Convention standard has been weakened in recent decades with the negotiation of the 1977 Protocols to the Geneva Convention of 1949. As noted in one commentary: "A majority of states that participated in the international conferences that adopted the additional protocols of 1977 were sympathetic to the insurgent sides in the so-called 'wars of national liberation.' Such insurgents usually did not wear uniforms or carry their arms openly, but concealed themselves among the population at large."[17]

Such practices, while arguably unavoidable for poorly trained and under-financed insurgents confronting powerful regular armies, nonetheless pose a great risk to civilians because they make it difficult or impossible for uniformed soldiers to distinguish between friend and foe. Recognizing this dilemma, the drafters of the 1977 Protocols tried to craft a compromise that would legitimize the insurgent movements they supported while still affording some protection to the innocent civilians caught in the inevitable crossfire. They did this by deemphasizing the Hague Convention requirements that belligerents wear uniforms and distinctive insignia, focusing instead on the requirement that *the combatants bear their arms openly*. The 1977 Protocols state: "In order to protect the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military occupation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain this status as a combatant, *provided that, in such situations, he carries his arms openly*:

(a) During each military engagement, and
(b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."[18]

Controversy surrounds the 1977 Protocols.[19] Nonetheless, the position they espouse has probably achieved broad enough acceptance to be deemed declarative of customary international law.[20] At bottom, the requirement seems to be that combatants refrain from holding themselves out as something they are not — they cannot pose or pass themselves off as civilians. Even when dressed in civilian garb, fighters must make it clear that they are combatants and not bystanders. Under this standard, the mere act alone of Iraqi fighters attacking from civilian vehicles or while wearing civilian clothes would not automatically violate international law. The law has shifted from a procedural focus on the wear of distinctive clothing and insignia, to a substantive fo-

cus on the conduct of fighters. Those who forthrightly show themselves for what they are (combatants) will generally fall within the bounds of the law, while those who deceptively masquerade as what they are not (civilians) generally do not. Unfortunately, Iraqi conduct falls far short even of this pragmatic standard. In deliberately concealing their identity as combatants, using civilian disguise as a ruse to get close enough to our troops to strike, Iraqi fighters commit a serious breach of international law.

Perfidious acts prohibited under international law are not limited to posing as civilians. Nor, regrettably, is Iraqi misconduct. Iraqi violations include feigning surrender as cover for an attack;[21] using emblems of international organizations, such as the red cross or red crescent, as cover for hostile action;[22] and exploiting the protected status of humanitarian and cultural sites such as mosques, schools, and hospitals, for military advantage.[23] Fortunately, these violations are not attended by tragedies like the checkpoint killings. But the potential for such tragedies is always there, and grows with each succeeding Iraqi violation. As one commentator has said, "the Iraqi regime, by blurring the distinction between combatants and civilians, has caused numerous casualties and *has put thousands of … Iraqi civilians in harm's way.*"[24] This increased risk goes to the heart of why international law prohibits such conduct. When combatants pose as civilians they "break down the distinction between fighters and civilians," and so put all civilians at risk.[25] When combatants deliberately seek out protected sites, such as mosques, churches, and hospitals, for military use they erode the sanctity of these sites by teaching the enemy to view them as likely enemy strongholds, thereby placing all such sites at risk. When fighters feign surrender or attack under a flag of truce, they "destro[y] the basis for reestablishing peace short of the complete annihilation of one belligerent by another"[26] and, by teaching the enemy to view surrendering troops as a threat, endanger all soldiers attempting surrender. Likewise, fighters who feign wounds or injury to lure the enemy within striking range teach their foes to view enemy wounded as a threat, placing all injured soldiers at risk.

If anything redemptive emerges from the tragic checkpoint killings in Iraq, it may be a renewed appreciation for the value of restraint in the conduct of war. The laws of land warfare are not merely a collection of compacts promulgated for the convenience of elites; they are not a legal fig leaf created to paper over the brutality of war with a veneer of gentility; nor are they a relic, well-intentioned but rendered obsolete by the advance of technology and the rise of terrorism and guerrilla warfare. On the contrary, when taken as a solemn obligation, the laws of war remain a bulwark for protecting the innocent. As gruesomely illustrated by recent tragedies in Iraq, deliberate and recurring disregard of established legal and moral standards during combat sets the stage for needless tragedy. While not perfectly effective, the laws of land warfare nonetheless remain our best means of mitigating the awful consequences of war.

Notes

[1]Nadim Ladki, "Check Point Killings," *Reuters* at *www.att.net,* accessed 1 April 2003.

[2]"U.S. Sticks to Iraq Check Point Rules Despite Deaths," *Reuters* at *www.att.net,* accessed 1 April 2003.

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[3]It should be noted, however, that in some cases, Iraqis killed or injured at checkpoints did behave in ways that may have appeared threatening to our troops, such as failing to stop at or speeding through checkpoints. Nonetheless, our forces may have been able to deal with such behavior in a less lethal manner, but for the very real threat of suicide bombings.

[4]"Who is the Enemy?" *CBSNews.com* at *www.cbsnews.com/stories/2003/03/27/iraq/main546378.shtml,* accessed 27 March 2003.

[5]"Suicide Bomber Kills Four U.S. Troops at Iraq Checkpoint," *Pittsburgh Tribune-Review* at *www.pittsburghlive.com/x/tribune-review/specialreports/iraq/s_126421.html,* accessed 29 March 2003.

[6]"Car Blast Kills 5 Near Iraq Check Point," *Milwaukie Journal-Sentinal* at *www.jsonline.com/news/intl/ap/apr03/ap_war_car_exploi040503.asp,* accessed 5 April 2003.

[7]"Who is the Enemy?" *CBSNews.com*.

[8]William T. Sherman, *Memoirs of General William T. Sherman*, Volume 2, Da Capo Press, New York, NY, 1984, p. 126.

[9]U.S. Army Field Manual (FM) 27-10, *The Law of Land Warfare*, U.S. Government Printing Office, Washington, D.C., 18 July 1956, takes the analogy to domestic law farther, comparing these treaties to laws passed by legislatures within the United States, but the analogy is a poor one. International treaties and domestic legislation are not analogous. Laws enacted by Congress or state legislatures bind everyone. Treaties, however, are not created by some overarching international legislative authority, but are entered into voluntarily by the individual signatory states and bind those signatories only, except to the extent that the treaty provisions coincide with or become incorporated into customary international law.

[10]Ibid., pp. 4-5.

[11]In this article, I am not concerned with the matter of what international conventions Iraq has or has not joined. I assume that any pertinent provisions have become incorporated into customary international law, thus binding Iraq whether it is a signatory to any particular treaty or not.

[12]FM 27-10, p. 3.

[13]Customary international law encompasses all of these issues. Treaty law addresses them as well. Uniforms, insignia, and bearing arms openly are addressed under the Hague Convention (IV) of 1907, Annex to the Convention, Article I; and Protocol I (1977) Additional to the Geneva Conventions of 1949, Article 44, paragraph 3. Flags of truce and the Red Cross/Red Crescent are addressed under Article 23, paragraph f of the Annex to the Convention, Hague Convention (IV) of 1907. The status of cultural and humanitarian sites is addressed in the Hague Convention (IV) of 1907, Annex to the Convention, Article 27; Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, 1907; Convention for the Protection of Cultural Property in the Event of Armed Conflict, the Hague 1954; and Protocol I (1977) Additional to the Geneva Conventions of 1949, Article 53 (also of interest is General Eisenhower's Memorandum of 26 May 1944, outlining allied policy toward historical monuments and cultural centers during the invasion of Europe). All of the above are set forth in Michael Reisman and Chris T. Anoniou, *The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict,* Vintage Books, New York, NY, 1994, pp. 47, 94, 96-104, and 105.

[14]Reisman and Anoniou, p. 41.

[15]Ibid., 41.

[16]Ibid., 43.

[17]Ibid.

[18]Ibid.

[19]Despite U.S. reservations, our own words and deeds seem to indicate, implicitly at least, that we are moving closer toward the position of the 1977 Protocols. In Afghanistan and other places, we have actively supported or fought side-by-side with non-uniformed combatants. In Afghanistan, our special operations forces have sometimes operated in a "modified uniform," consisting of a mixture of civilian clothes with military items. In distinguishing this last practice from the conduct of the Iraqi *Fedayeen Saddam*, the Department of Defense cited the wear of at least some uniform items by these forces, but primarily relied on an argument consistent with the standard set out in the 1977 Protocols: our special operations soldiers in Afghanistan always bear their arms openly, while Saddam's fighters don't. See Bryan Whitman, W. Hays Parks, and Pierre-Richard Prosper, "Briefing on Geneva Convention, EPWs and War Crimes," *DefenseLink* at *www.defenselink.mil/news/apr2003/t04072003_t407genv.html,* p. 4.

[20]This position is bolstered by the fact that the Hague Conventions of 1907 embraced the underlying concept of the 1977 Protocols as: "The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves … shall be regarded as belligerents *if they carry their arms openly* and if they respect the laws and customs of war." See Reisman and Antoniou, p. 41.

[21]Whitman, Parks, and Prosper.

[22]Ibid., p. 5.

[23]Ibid.

[24]Ibid.

[25]Reisman and Antoniou, p. 41.

[26]FM 27-10, p. 22. This statement is admittedly hyperbolic, but the point still holds. Such actions certainly make it harder to restore peace and cause more casualties than would have occurred otherwise.

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